85-1532

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE,

Respondent

On Writ of Certiorari To The
United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

In an action for libel predicated upon an expression of opinion in a matter of public concern wherein, solely because he is black, the defendant was cast and an exorbitant award of damages was levied by the jury, had state action been provided for purposes of the Fourteenth Amendment and 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3), when judgment on the verdict for the plaintiff was affirmed by the highest court of the state?

THE PARTIES

All parties to the proceedings in the lower courts are named in the caption.

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TO THE UNITED STATES COURT OF
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Petitioner, James N. Fleming ("Petitioner" or "Fleming") respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit by which the dismissal of his complaint by the United States District Court for the Western District of Virginia was affirmed. Petitioner, a black citizen of Virginia, seeks injunctive relief against enforcement of a judgment entered against him in a state

court action based soley upon his published expressions of opinion concerning the wants and motivations of his most vocal opponent in a then on-going zoning controversy. He seeks the same immunity from punishment, penalties and exactions for exercise of First Amendment freedoms as in Virginia is enjoyed by white citizens.

The Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is or is to be published, viz:

Fleming v. Moore, _____ F.2d ____ (4th Cir. No. 85-1361; 1985) (App. J.).

Opinions of the Supreme Court of Virginia in the defamation action are published, viz:

Fleming v. Moore, 221 Va. 884, 275 S.E. 2d 632 (1981) (Fleming I)

Fleming v. Moore, sub nom The Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E. 2d 713 (1985) (Fleming II)

Grounds for Jurisdiction

The judgment sought to be reviewed is dated and was entered on December 26, 1985 (App. 11).

Rehearing was denied by order filed February 3, 1986 (App. 13).

Title 28, Section 1254(1) confers on this Court jurisdiction to review the judgment by writ of certiorari.

The Constitutional Provisions and Statutes Involved

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code, Section 1981: Equal rights under law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Title 42 United States Code, Section 1983: Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage,of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.

Title 28 United States Code, Section 1343(3): Civil rights and elective franchise

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person * * * (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Statement of the Case

In January 1976, in the heat of the public controversy which followed his application for re-zoning to permit construction and sale of low-cost housing, Fleming, a black real estate developer, caused to be published an article captioned "Racism" in which, of and concerning his most vocal opponent, this appeared:

> "There is a great deal of irony in the fact that here in Mr. Jeffer-

> son's country 200 years after his vision of situating his beloved Monticello upon the hilltop overlooking the developing community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight."

The full text of the article is in the appendix at pages 53-54.

The respondent, Moore, filed an action against Fleming in the Circuit Court of Albemarle County, Virginia on 3 January 1977 demanding $500,000 in actual damages and $500,000 in punitive damages.

The first trial of the libel action ended on December 6, 1977 with the verdict of an all-white[1] jury awarding Moore $10,000 in compensatory damages and

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[1]App. 38; Complaint, paragraph 32.

$100,000 in punitive damages, on which the trial court entered judgment on April 28, 1978.[2] Over the dissent of Justice Harrison who would have reversed and entered final judgment for the defendant (Fleming), the Supreme Court of Virginia remanded the case for a new trial. Fleming v. Moore, 221 Va. 884, 275 S.E. 2d 632 (1981). Fleming's claims of privilege under the First Amendment were answered by the Virginia court, viz:

> Since Fleming is not a media defendant and Moore is not a public figure, Gertz [Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)] does not control the present case." 221 Va. at 893; 275 S.E. 2d at 638.

The second trial of the libel action ended on October 22, 1982 with a verdict of the jury (from which Moore's counsel had peremptorily struck every black venireman) awarding Moore $100,000 in

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[2]App. 32, Complaint, paragraph 26.

compensatory damages and $250,000 in punitive damages, together with interest on the $250,000 award at 12% per annum from January 16, 1976. Judgment on the verdict was entered on June 3, 1983.[3]

By order of June 7, 1984 the Supreme Court of Virginia awarded Fleming a second appeal; expressly rejecting, however, Fleming's assignments of error which addressed the trial court's denial of his claims to First Amendment privilege.[4] Certiorari was denied October 29, 1984; ____ U.S. ____, No. 84-382.

By Amended Complaint filed August 9, 1984 in the United States District Court for the Western District of Virginia, the petitioner (Fleming) sought (1) an adjudication that his publication is,

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[3]App. 34; Complaint, paragraph 28.

[4]App. 35-37; Complaint, paragraphs 30, 31.

indeed, within the protection of the First Amendment, (2) injunctive relief forestalling enforcement of the state court judgment predicated solely upon his publication, and (3) damages in compensation for his costs, expenses, counsel fees, harassment, and loss of time in defending the action for libel and his costs and reasonable counsel fees incident to his federal action.

Jurisdiction of the district court was invoked under Title 28 United States Code, Sections 1331 and 1343(3); the action being one arising under the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United Sates and under Title 42 United States Code, Sections 1981 and 1983.

By order entered 27 March 1985, the district court granted Moore's motion to

dismiss. In pertinent part the order says:

> "[T]he court is of the opinion that plaintiff's sole remedy in the federal courts is by appeal to the United States Supreme Court. A district court may not impose its judgment simply to correct an apparent injustice done in the state courts. To do so would be to create an appellate court where none was intended." (App. 16).

A panel of the Court of Appeals affirmed. The December 26, 1985 opinion by Judge Sprouse holds:

> "There is no question, of course, that in order to sustain an action under 42 U.S.C. Section 1983, a plaintiff must show both that he has been deprived of a right secured by the Constitution of the United Sates and that the defendant 'deprived [him] of this right "acting under color of any statute"' of a state. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978). There is likewise no question that Moore, in bringing his state libel action against Fleming, did not act on behalf of the state or any of its political subdivisions." (App. 8)

Meanwhile, on February 1, 1985 the state appellate court decided Fleming's second appeal, sub nom, The Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E. 2d 713

(1985) (Fleming II). The court held that the compensatory award "is so out of proportion to the damages sustained [as] to suggest that it is not the product of a fair and impartial decision" (229 Va. at 48; 325 S.E. 2d at 745) and that the punitive award "on its face indicates prejudice or partiality" (229 Va. at 51; 325 S.E. 2d at 747). The case was remanded for a new trial upon the issue of damages only, or, at the option of the plaintiff (Moore), for remittitur of "substantial" parts of both awards.

Moore elected to remit one-third of the awards (the trial judge having ruled such to be "substantial"); and on May 13, 1985 the Circuit Court of Albemarle County, Virginia, entered judgment against Fleming for $233,333.34. On January 24, 1986 the Supreme Court of Virginia denied Fleming's petition for appeal. On January 30, 1986 Fleming filed a petition for rehearing in which

the court's attention was called to its September 6, 1985 decision in Chaves v. Johnson, 230 Va. 112, 335 S.E. 2d 97; and the court was urged to follow the precedent of United States v. The Schooner Peggy, 1 Cranch (5 U.S.) 103 (1801) and City of Norfolk v. Stevenson, 185 Va. 305, 315, 32 S.E. 2d 570 (1946) and to hold that Fleming's expressions, like those reviewed in Chaves, were "mere statements of opinions, and were thus not actionable as defamatory words" (230 Va. at 118; 335 S.E. 2d at 101). Rehearing was denied on March 7, 1986.

ARGUMENT

I

The Reach Of The First Amendment Is Not An Issue Here

The federal courts did not rule on the question whether Fleming's publication was privileged under the First Amendment. However, on 6 September 1985 in an action between two white

citizens both of whom are architects, the Supreme Court of Virginia affirmed a trial court's denial of the jury's award of damages on the defamation count. The appellate court classified as "mere statements of opinion" the charges in a letter from one of the architects to members of the Council of the City of Fredericksburg that his competitor, having had no prior experience in a project such as the proposed city hall, was not the best qualified and, moreover, that the city was paying over 50% more than a reasonable fee. In that case, Chaves v. Johnson, supra, the court did not use the absence of a public figure plaintiff and a media defendant as in Fleming I it had done to evade the thrust of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Forthrightly, the Virginia court said:

> "Pure expressions of opinion, not amounting to 'fighting words,' cannot form the basis of an action

> for defamation. The First Amendment to the Federal Constitution and article 1, section 12 of the Constitution of Virginia protect the right of the people to teach, preach, write, or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander. '[E]rror of opinion may be tolerated where reason is left free to combat it.' Thomas Jefferson's First Inaugural Address (1801). 'However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3006-07, 41 L.Ed 2d 789 (1974).
>
> "It is for the Court, not the jury, to determine as a matter of law whether an allegedly libellous statement is one of fact or one of opinion." (230 Va. at 112; 335 S.E. 2d at 101-2)

Even if Fleming's diatribe did not have absolute privilege under the First Amendment, the Supreme Court of Virginia rejected out of hand his claim that Moore was a limited purpose public figure in the light of evidence received at the re-trial of the libel action, e.g., Moore's having openly proclaimed himself

to be an advocate for the good of his neighbors and the county as a whole (App. 47).

II

The District Court Disclaimed As "Appellate" Its Jurisdiction To Grant The Unique Remedy Which The Congress Devised For The Protection Of Citizens Against Unconstitutional Action By State Agencies

In its order of dismissal, the district court expressed its opinion that the plaintiff's sole remedy in the federal courts is by appeal to the United States Supreme Court. The order reads:

> "A district court may not impose its judgment simply to correct an apparent injustice done in the state courts. To do so would be to create an appellate court where none was intended." (App. p. 16).

The quoted language is similar to that of Justice Van DeVanter for the Court in Rooker v. Fidelity Trust Co., 263 U.S. 412, 415-416 (1923), viz:

> "Under the legislation of Congress, no court of the United States other than this court could entertain a

> proceeding to reverse or modify the judgment [of a state court] for errors of that character. Judicial Code, Section 237, as amended September 6, 1916, chap. 448, Section 2, 39 Stat. at L. 726, Comp. Stat. Section 1214, Fed. Stat. Anno. Supp. 1918, p. 411. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the district courts is strictly original. Judicial Code, Section 24.

In Rooker the issue was whether a trustee had violated and repudiated the trust or whether, as the state court found, the settlors of the trust should be enjoined from hindering its execution. The Court was not dealing with 28 U.S.C. Section 1343(3) which confers upon district courts "original" jurisdiction of any civil action authorized by law [42 U.S.C. Section 1983] to be commenced by any person "(3) To redress the deprivation, under color of law . . . of any right, privilege or immunity secured by the Constitution of the United States [Amendments I and XIV] or by any Act of Congress providing for the equal rights

of citizens or of all persons within the jurisdiction of the United States [42 U.S.C. Section 1981].

In Mitchum v. Foster, 407 U.S. 225 (1972), an action under 42 U.S.C. Section 1983, the petitioner sought a federal injunction against a pending proceeding under claimed authority of a Florida statute to close down his bookstore as a public nuisance; and the three-judge district court held that the anti-injunction statute (28 U.S.C. Section 2283) barred such relief. This Court reversed and remanded and thereby put to rest the question whether 42 U.S.C. Section 1983 "comes within the 'expressly authorized' exception of the anti-injunction statute so as to permit a federal court in a Section 1983 suit to grant an injunction to stay a proceeding pending in a state court" (407 U.S. at 226).

> "* * * Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy

against incursions under the claimed authority of state law upon rights secured by the Constitution and Laws of the Nation." (Id. at 239)

"* * * The very purpose of section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights--to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' Ex parte Virginia, 100 US, at 346, 25 L Ed at 679. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in Section 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. Ex parte Young, 209 US 123; cf. Truax v Raich, 239 US 33; Dombrowski v. Pfister, 380 US 4790" (Id. at 242)

III

The Holding Of The Court Of Appeals, That Requisite State Action Is Not Shown, Conflicts With The Statute, With Decisions Of This Court, And With Decisions of The Fifth And Second Circuits

A

Citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978), the court of appeals held that in order to sustain an action under 42 U.S.C. Section 1983, a plaintiff must show that the defendant, acting under color of state law, deprived him of a constitutional right. This reasoning overlooks so much of 42 U.S.C. 1983 as makes liable to suit "every person who, under color of any statute, . . . [etc.] causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws."

B

In Lugar v. Edmonson Oil Co., 639 F.2d 1058 (4th Cir. 1981), rev'd in part, 457 U.S. 992 (1982), the Court of Appeals for the Fourth Circuit had read Flagg Brothers and related cases, e.g. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970), as shielding the judgments of state courts from attribution to the successful state plaintiffs, absent usurpation or corruption of official powers by such plaintiff or surrender of power by the state court. As Justice White stated it:

> "The court held that a private party acts under color of state law within the meaning of Section 1983 only when there is a usurpation or corruption of official power by the private litigant or a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant degree" (457 U.S. at 926; emphasis added).

Continuing, Justice White wrote:

> "The decision of the Court of Appeals rests on a misreading of

> Flagg Brothers. * * * There was no reason in Flagg Brothers to address the question whether there was action under color of state law. * * * Although the state-action and undercolor-of-state law requirements are 'separate areas of inquiry,' Flagg Brothers did not hold nor suggest that state action, if present, might not satisfy the Section 1983 requirement of conduct under color of state law. Nevertheless, the Court of Appeals relied on Flagg Brothers to conclude in this case that state action under the Fourteenth Amendment is not necessarily action under color of state law for purposes of Section 1983. We do not agree" (457 U.S. at 903).

The paragraphs next quoted from this Court's opinion in Lugar negate the notion that state judicial action not shown to be tainted by usurpation or corruption is immune from Section 1983 attack, however unconstitutional it may have been.

> "To read the 'under color of any statute' language of the Act in such a way as to impose a limit on those Fourteenth Amendment violations that may be redressed by the Section 1983 cause of action would be wholly inconsistent with the purpose of Section 1 of the Civil rights act of 1871, 17 Stat 13, from which Section 1983 is derived. The Act was passed 'for the express purpose of 'enforc[ing] the Provisions of the

Fourteenth Amendment..'" Lynch v. Household Finance Corp., 405 U.S. 538, 545, 31 L Ed 2d 424, 92 S Ct 1113 (1972). The history of the Act is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual. Perhaps the most direct statement of this was that of Senator Edmunds, the manager of the bill in the Senate: '[Section 1 is] so very simple and really reenact[s] the Constitution." Cong Globe, 42d Cong, 1st Sess, 569 (1871). Representative Bingham similarly stated that the bill's purpose was 'the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guarantied to him by the Constitution.' Id., App 81.

"In sum, the line drawn by the Court of Appeals is inconsistent with our prior cases and would substantially undercut the congressional purpose in providing the Section 1983 cause of action. If the challenged conduct of respondents constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under Section 1983.

"Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of 'fair attribution.' First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. In Sniadach, Fuentes, W. T. Grant,

North Georgia, for example, a state statute provided the right to garnish or to obtain prejudgment attachment, as well as the procedure by which the rights would be exercised. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." (457 U.S. at 934-935. Emphasis added.)

C

The 1980 opinion of this Court in Lugar is consistent with its earlier denial of certiorari in Henry v. First National Bank of Clarksdale (Henry II), 595 F.2d 291 (5th Cir. 1979) cert denied 444 U.S. 1074 (1980). In state court litigation against NAACP, MAP, and various individuals, 23 white merchants in Port Gibson and Claiborne County, Mississippi, had obtained injunctive relief against a boycott and an award of $1.25 million for damages and attorneys' fees. In Henry II, the District Court "preliminarily enjoined the state court

plaintiffs from taking any action to enforce the final decree of the Chancery Court against the NAACP or other state defendants . . . pending the appeal of the state court judgment to the Mississippi Supreme Court" (595 F.2d at 297). The Fifth Circuit affirmed, holding that the federal defendant-appellants had obtained significant aid from state officials, meeting the state action requirements of the Fourteenth Amendment and section 1983.

> "The requisite state action which we found absent in Henry I has since been supplied by entry of the state Chancery Court judgment which is immediately enforceable. The crucial difference between a private party who has merely filed a civil suit in a state forum and the successful litigant who possesses an immediately enforceable state judgment is that in the latter case the full power and authority of the state can be invoked on behalf of the litigant. It is this exercise of state power that provides state action for purposes of the Fourteenth Amendment and Section 1983." (559 F.2d at 299)

Most recently the Second Circuit affirmed (in part) an order of the Southern District of New York which, by preliminarily restraining Pennzoil from seeking to enforce the 10 December 1985 $11.12 billion judgment of a Texas state court against Texaco, Inc., had relieved Texaco, Inc. from the insurmountable requirement of a $12 billion appeal bond. On the point of action attributable to the state, the court's reasoning follows:

> "* * * The Supreme Court has enunciated a two-step test for determining whether conduct resulting in the deprivation of a federal right is 'fairly attributable to the State.' Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).
>
> 'First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state

officials, or because his conduct is otherwise chargeable to the State.' Id.

"Texaco has satisfied the first prong of this test since Texas law provides for enforcement of the judgment unless Texaco posts a supersedeas bond in the full amount of the judgment. Tex. R. Civ. P. 364(b), supra. Pennzoil contends, however, that it cannot fairly be termed a 'state actor' and that the suit therefore fails to meet the second prong of the test. Resolution of this issue calls for a factual inquiry into the relationship between Pennzoil and the State of Texas that would result from Pennzoil's enforcement of the judgment. See Lugar, supra, at 939 (citing Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

"To enforce the judgment, Pennzoil would have to act jointly with state agents by calling on state officials to attach and seize Texaco's assets. A judgment creditor must first obtain a writ of execution, which is 'a process of the court from which it is issued.' Tex. R. Civ. P. 622. The writ is 'directed to any sheriff or any constable within the State of Texas' and must be signed by the clerk or justice and bear the seal of the court. Tex. R. Civ. P. 629. Furthermore, the writ 'shall require the officer to execute according to its terms.' Id. Finally, when, as here, the judgment requires payment of money, the writ 'must require the officer to satisfy the judgment and costs

out of the property of the judgment debtor subject to execution by law.' Tex. R. Civ. P. 630. When the sheriff or constable receives the writ, Texas law commands that 'he shall proceed without delay to levy the same upon the property of the defendant.' Tex. R. Civ. P. 637. Property levied upon pursuant to the writ of execution may ultimately be seized by the officer and liquidated to satisfy the judgment. Tex. R. Civ. P. 646a, 649.

"In addition, Texas law authorizes the placement of judgment liens upon Texaco's property in the state immediately upon entry of judgment. Tex. Prop. Code Ann. Section 52.001. Such liens are acquired by requesting state officials to undertake a series of acts. Pennzoil must obtain a certified abstract of the judgment from the clerk of the court which rendered judgment. Id. Section 52.002. The abstract must contain certain information required by law. Id. Section 52.003. The county clerk must then record the abstract in the county judgment record and enter it in the index to the record. Id. Section 52.004.

"Enforcement of the state court judgment therefore necessarily involves a panoply of activities undertaken together by Pennzoil and state officials, which constitutes joint action for the purposes of Section 1983. In Lugar v. Edmondson Oil Co. the Supreme Court concluded that a private party who invoked Virginia's prejudgment attachment procedure acted jointly

with the state. Lugar, supra, 457 U.S. at 942. The Virginia prejudgment attachment procedure, like the Texas procedure at issue here, provided that a private party could obtain a writ from the clerk of the state court and have the writ executed by a county sheriff. Id. at 924-25. Under the Virginia law, the sheriff was only empowered to attach the property,while its owner retained possession. The Texas procedure, however, goes further and permits seizure by a Texas sheriff of attached property. We conclude, as the Supreme Court did in Lugar, that the 'private use of the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment' and Section 1983. Id. at 933.

"A different result is not compelled by the fact that Lugar involved a prejudgment attachment whereas the attachment here would be pursuant to a court judgment. The presence of a court judgment does not alter the fact that Texas state officials execute the judgment only at Pennzoil's behest. Pennzoil cannot be divorced from that execution procedure merely because a court authorized execution of the judgment. Indeed, to so hold would preclude the victim from obtaining relief against the party who must act jointly with the state official to unleash the unconstitutional state government action. To limit the Lugar rationale to prejudgment attachments would violate the precept that Section 1983 provides a remedy 'as broad as the protection

> of the Fourteenth Amendment affords the individual.' Lugar, supra, at 934.
>
> "Our ruling in Dieffenbach v. Attorney General of Vermont, 604 F.2d 187 (2d Cir. 1979), supports the conclusion that a party acting pursuant to a state court judgment is not necessarily insulated from the reach of Section 1983. In Dieffenbach we found that a bank was subject to suit under Section 1983 when it utilized an allegedly unconstitutional foreclosure procedure to enforce a judgment against a mortgagor. We noted that in order to execute the judgment the bank was required to obtain a decree of foreclosure and that possession could only be gained by obtaining a writ from the clerk of the court which must be executed by a sheriff. Id. at 194 and n. 12." Texaco, Inc. v. Pennzoil Company, ____ F.2d ____, (2nd Cir. Nos. 86-7046, 86-7052; February 20, 1986) Slip Op. pp. 23-26.

The Fifth Circuit in Henry and the Second Circuit in Texaco posited "state action" on the prospective joint efforts of the creditor(s) and the state officials to enforce the judgment. Since such enforcement procedures would be resorted to in virtually every case in which the plaintiff prevailed, such reasoning by

the courts of appeals might be in conflict with the admonition in Dennis v. Sparks, 449 U.S. 24, 28 (1980) that "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with a state official.

Although Dennis v. Sparks holds that private parties who corruptly conspire and bribe a judge to find in their favor are thus acting under color of state law within the meaning of Section 1983, it does not indicate, as the Fourth Circuit expressly held in Lugar v. Edmonson Oil Co., Inc., 639 F.2d 1058, 1069, 4th Cir. 1981, rev'd in part, 457 U.S. 922 (1982), and appears to have believed in this case, that only those judgments which are so tainted are subject to collateral attack for deprivation of the constitutionally secured right of due process.

We submit that to the same extent as state executive or legislative action

may be challenged in a Section 1983 case, so may the judgment of a state court. A judgment in debt for wilful failure to tithe should be as vulnerable to attack in federal court as would be the quartering of a unit of the national guard in a private home in time of peace. And as is demonstrated in Patsy v. Board of Regents, 457 U.S. 496 (1982),the Congress did not intend that the defaulting communicant would be required, even once, to negotiate the full labyrinth of state judicial proceedings before resorting to federal court for a summary vindication of his right not to be harassed for his refusal to support a religion.

IV

Petitioner Has Suffered And Will Continue To Suffer Irreparable Deprivation Of Constitutional Right

"The loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable

injury." Elrod v. Burns, 427 U.S. 347, 373 (1976).

If, as petitioner contends, his publication was privileged under the First and Fourteenth Amendments, he has suffered irreparable loss of freedom of speech and of the press during his every conscious hour from the first time the trial court refused to dismiss the libel action for insufficiency of the publication as "the predicate of an action for libel and an award of damages." (Fleming I; 221 Va. at 895, 275 S.E. 2d at 639, Harrrison, J., dissenting.)

Following reversal of the initial verdict and judgment for $10,000 in compensatory damages and $100,000 in punitive damages--awards which Justice Harrison found to be "shocking", Fleming until 1 February 1985 lived under the shadow of the 3 June 1983 judgment on awards which with pre-judgment interest exceeded $570,000--a punishment which

the Supreme Court of Virginia held, on its face, to be indicative of "prejudice or partiality" and even "destructive." (Fleming II, 229 Va. at 51, 325 S.E. 2d at 747). In consummate deprivation of property without due process of law, the final judgment entered 13 May 1985 for $233,333.34 and affirmed on 7 March 1986 stands as the largest defamation judgment ever affirmed in Virginia's history.

V

The Libel Judgment
Stems From Racial Prejudice

The petitioner has alleged that he was cast solely because of his race. (App. 38; Complaint, paragraph 32). The allegation is more than merely colorful. Petitioner had dared to publish his protest against racism in Albemarle County where racism was so prevalent that a venerable attorney thought it a "strange thing" that in their 25 years of intimate acquaintance he had never heard

the respondent speak disparagingly of black people (App. 20, Complaint, paragraph 5).

A jury of seven white citizens of the county, the respondent having peremptorily struck all blacks, was sworn to determine whether and, if so, to what extent the petitioner should be punished for his effrontery. To that jury the respondent testified: "I felt that he [Fleming] had put a gap in my honor that could only be restored by vindication of my fellow citizens on this jury." (Fleming II: 229 Va. at 47; 325 S.E. 2d at 744). On proof limited to Moore's claim that on occasions he was upset and embarrassed, that jury awarded vindication exceeding a half million dollars--the largest libel verdict upheld by a trial court in Virginia. (App. 35; Complaint, paragraph 29).

Since the earliest days of the Commonwealth, trial judges have summarily protected the constitutional right of white citizens "to teach, preach, write or speak any . . . opinion [if not expressed in 'fighting words'], however ill-founded, without inhibition by actions for libel and slander." (Chaves v. Johnson, supra) "Although the indignation of Professor Moore is understandable we should not allow the publication involved here to be the predicate of an action for libel and an award of damages. I would enter final judgment for the defendant." Harrison, J., dissenting in Fleming I.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari will issue.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE,

Respondent

On Writ of Certiorari To The
United States Court of Appeals
For The Fourth Circuit

A P P E N D I X
To
Petition For Writ Of Certiorari

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1361

James N. Fleming, Appellant,

versus

W. Bedford Moore, III, Appellee,

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James C. Turk, Chief District Judge. (C/A 84-42).

Argued: November 7, 1985 Decided: December 26, 1985

Before WIDENER and SPROUSE, Circuit Judges, and HAYNESWORTH, Senior Circuit Judges.

S. W. Tucker (Hill, Tucker & Marsh; Gerald G. Poindexter; Poindexter & Poindexter on brief) for the Appellant; Thomas E. Albro (Bradley B. Cavedo; Smith, Taggart, Gibson & Albro on brief) for Appellee.

SPROUSE, Circuit Judge:

James M. Fleming, a black real estate developer in Charlottesville,

Virginia, appeals from the judgment of the district court dismissing his Section 1983[1] action against W. Bedford Moore, III, a white professor at the University of Virginia. In his federal complaint Fleming pursued several aspects of a libel action which he had previously lost as a defendant in a Virginia state court. We affirm the district court's ruling dismissing the action since Fleming's sole possible federal remedy is by appeal from the Supreme Court of Virginia to the United States Supreme Court.

The genesis of both the state libel suit, in which Fleming was a defendant, and this action, in which he is the plaintiff, was an advertisement Fleming wrote and published which Moore alleged labeled him a racist. Fleming's disagreement with Moore arose from the

---

[1]42 U.S.C. Section 1983 (1982).

former's desire to develop a real estate subdivision adjacent to Moore's home, which was modeled after Thomas Jefferson's Monticello and was situated on approximately 100 acres of land. Beginning in late 1974, Fleming submitted proposals and sought zoning approval to build a planned unit development called Evergreen. Moore opposed the development of Evergreen and spoke out against it at meetings of the planning commission and board of supervisors. Moore spoke of incompatibility of land use, of conservation, and of concerns for the reservoir in the area. The planning commission initially rejected the Evergreen proposal, but later approved a modified plan which provided for a lower population density and a 100 foot buffer strip of trees surrounding the development.

During the zoning controversy, Fleming ran an "advertisement" in the Charlottesville-Albemarle Tribune and

the Cavalier Daily (the University of Virginia student newspaper). It read in part:

R A C I S M

> I have endeavored to realize the opportunity to provide housing and pleasant surroundings for working people - the sort of people who made this the great country that it is.
>
> I do not expect any Farmington members to buy my houses. The tenured position-holders who live off the public dole at the expense of the working people are already well-housed, and could not be expected to live in a racially-integrated neighborhood, anyhow.
>
> There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hilltop overlooking the developing community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little

> Monticello does not want any black people within his sight . . . .

On January 3, 1977, Moore brought libel actions against Fleming in the circuit courts of Albemarle County and the City of Charlottesville. A jury verdict in the Albemarle County case awarded Moore $10,000 in compensatory damages and $100,000 in punitive damages. Fleming appealed to the Virginia Supreme Court, which reversed the case and remanded it for a new trial. Fleming v. Moore, 221 Va. 884, 275 S.E. 2d 632 (1981) (Fleming I). The Virginia court held that the trial court erred in ruling that Fleming's advertisement was defamatory per se and remanded it with instructions on how damages must be proven.

At the second trial, an all white jury found for Moore, awarding him $100,000 in compensatory damages and $250,000 in punitive damages as well as

prejudgment interest of 12% on the punitive damages. The Supreme Court of Virginia granted an appeal on certain issues, and reversed and remanded on the amount of damages awarded. Moore was given the option of remitting "a substantial part" of the award or undertaking a new trial on the issue of damages only. Gazette, Inc. v. Harris, 325 S.E. 2d 713 (Va. 1983) (Fleming II). Moore has since agreed to remit one-third of the awards. Execution of the altered judgment has been stayed pending yet another review by the Virginia supreme court.

Fleming sought review of Virginia supreme court rulings by petitioning the United States Supreme Court for a writ of certiorari on September 5, 1984. He asked for a review on the questions of whether the advertisement was a constitutionally protected opinion and whether Moore was a "limited-purpose" public

figure. The petition was denied. Fleming filed a second petition for certiorari which was docketed May 2, 1985. In that petition, Fleming repeated his earlier questions and raised others regarding Fleming's state of mind when he published the advertisement and whether the composition of the jury in the second state court trial violated Fleming's due process rights. Once again the Supreme Court denied certiorari.

On August 9, 1984, Fleming filed an amended complaint in the United States District Court for the Western District of Virginia, seeking an injunction against enforcement of the state court award as well as other relief. The district court granted Moore's motion to dismiss the complaint on March 27, 1985. In his dismissal order, Judge Turk wrote that he was "of the opinion that plaintiff's sole remedy in the federal courts is by appeal to the United States Supreme

Court." Fleming v. Moore, C/A No. 84-0042-C, slip op. at 1 (W.D.Va. March 29, 1985).

There is no question, of course, that in order to sustain an action under 42 U.S.C. Section 1983, a plaintiff must show both that he has been deprived of a right secured by the Constitution of the United States and that the defendant "deprived [him] of this right 'acting under color of any statutes'" of a state. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978). There is likewise no question that Moore, in bringing his state libel action against Fleming, did not act on behalf of the state or any of its political subdivisions. Fleming contends, however, that

> [t]he circumstances alleged here indicate that consideration of race caused the unfairness and partiality which pervaded the entire process of decision. The 1871 Act to enforce the Provisions of the Fourteenth Amendment expressly authorized the lower federal

> courts to grant equitable relief from judgments of state courts when the decision process is shown to be flawed by racial considerations. The subsequent incorporation of the First Amendment into the Fourteenth emphasizes, in this case, the imperative of liberty and justice for all.

The state action apparently by Fleming is that

> the Supreme Court of Virginia failed, and later refused, to consider Fleming's claim of absolute privilege under the First Amendment to publish his opinion as to what his most vocal opponent in an on-going zoning controversy wants and does not want. By its failure 6 March 1981 to recognize that claim and, accordingly, to enter final judgment for the defendant ..., that court subjected Fleming to the expense, anguish and risk of further litigation and thereby denied to him the equal protection of the laws. And by its 7 June 1984 refusal to consider such claim, that court gave its approval to the deprivation of Fleming's property without due process of law.

We find no merit in Fleming's argument.

Fleming has, on two occasions, attacked the judgment of the Supreme

Court of Virginia by petitioning the United States Supreme Court for certiorari. This, of course, was the appropriate procedure. We detect nothing in 42 U.S.C. Section 1983 that would permit a federal court to relitigate the libel issues under circumstances present here.

AFFIRMED.

FILED
DEC. 26, 1985
U. S. Court of Appeals
Fourth Circuit

JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit
No. 85-1361

James N. Fleming, Appellant,

vs.

W. Bedford Moore, III, Appellee,

National Association for the Advancement of Colored People Amicus Curiae

Appealed from the United States District Court for the Western District of Virginia, at Charlottesville. James C. Turk, District Judge.

This cause came on to be heard on the record from the United States District Court for the Western District of Virginia, at Charlottesville, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, AFFIRMED.

s/ John M. Greacen
CLERK

FILED
Feb. 3, 1986
U. S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1361

James N. Fleming,

Appellant,

versus

W. Bedford Moore, III,

Appellee,

National Association for the Advancement of Colored People,

Amicus Curiae.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James C. Turk, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc be denied.

Entered at the direction of Judge Sprouse, with the concurrence of Judge Widener and Judge Haynsworth.

For the Court,

/s/ John M. Greacen
CLERK

Clerk's Office, U.S. Dist. Court
AT CHARLOTTESVILLE, VA.
FILED
March 29, 1985
Joyce F. Witt, Clerk
By: /s/ M. Thurman
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

JAMES N. FLEMING,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 84-0042-C
v.	)	
	)	
W. BEDFORD MOORE, III,	)	ORDER
	)	
Defendant	)	

Plaintiff James N. Fleming brought this action seeking, among other things, to enjoin defendant W. Bedford Moore, III, from executing on a judgment obtained against plaintiff in the Circuit court of the County of Albemarle. It is on that same state matter that plaintiff bases his other claims for injunctive relief, damages, and attorney's fees. On appeal to the Supreme

Court of Virginia, the state case was remanded for a hearing on remittitur or, at Moore's option, for a new trial on the issue of damages.

Defendant has moved that the court either dismiss this case or abstain from the exercise of jurisdiction. Having heard arguments and received briefs, the court is of the opinion that plaintiff's sole remedy in the federal courts is by appeal to the United States Supreme Court. A district court may not impose its judgment simply to correct an apparent injustice done in the state courts. To do so would be to create an appellate court where none was intended. It is hereby

ORDERED

that defendant's motion to dismiss is GRANTED.

The Clerk shall strike this case from the court's docket and send certi-

fied copies of this order to all counsel of record.

ENTER: This 27th day of March, 1985.

/s/ James C. Turk
Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

JAMES N. FLEMING, 304-A Ridge Street Charlottesville, VA 22901: Plaintiff,	:	CIVIL ACTION
vs.	:	NO: 84-0042-C
W. BEDFORD MOORE, III, Shack Mountain Route 5, Lambs Road, State Route 657 Charlottesville, VA 22901: Defendant.	:	

AMENDED COMPLAINT

1. This is an action for injunctive relief to protect rights, privileges and immunities of the plaintiff guaranteed by the Constitution and laws of the United States. Further, the plaintiff seeks damages, attorneys fees and other relief in vindication of his right, protected by the First Amendment to the Constitution of the United States, to express and publish opinions and

ideas for the bringing about of political and social change or for other lawful purpose.

2. Jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1331 and 1343(3). This action arises under the First Amendment and under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States and under Title 42, United States Code, Sections 1981 and 1983.

3. The plaintiff, Fleming, was born in Albemarle County, Virginia, on January 27, 1929 and thereafter, except for four years in military service and six years in college and post graduate study, he has lived in Albemarle County or in the adjacent City of Charlottesville. The plaintiff is a black person. All other persons hereinafter mentioned or referred to are white persons, unless otherwise indicated.

4. The defendant, W. Bedford Moore, III, is a tenured professor in the Humanities Division at the School of Engineering and Applied Sciences of the University of Virginia where for over twenty years he has taught. In the 1975-76 academic year he was an associate professor.

5. At all times material, Fleming believed that, with several exceptions, white citizens of Albemarle County and its environs asperse, debase, degrade, discredit, disparage, and reproach black people. The reasonableness of that belief was demonstrated in the second trial of the litigation hereinafter mentioned when Bernard Chamberlain, Esquire, a life long resident of Albemarle County and a practicing attorney since 1922, upon being asked on direct examination by Moore's counsel if in their twenty-five years of intimate acquaintance he had heard Professor Moore

say anything degrading about black people, answered in these words: "I never have, strange thing, I never have."

6. The defendant Moore and his wife own and reside on a 100 acre tract in Albemarle County known as Shack Mountain. Their dwelling house, sited on a ridge, is described in the testimony of an emeritus teacher of architecture at the University of Virginia as a twentieth century version of Thomas Jefferson's Monticello.

7. Prior to 1974 the plaintiff, Fleming, had acquired title to 81.5 acres adjoining which were 32+ acres belonging to Flamenco, a corporation the stock of which was owned equally by Fleming and B. B. Woodson. These two parcels, for more than 3,000 feet, adjoin the defendant's Shack Mountain. Another tract, adjacent to the 81.5 acres and to the 32+ acres and containing 14+ acres, was owned by Dailey Craig. The owners of these 128

acres, more or less, had agreed to develop thereon a residential subdivision to be known as Evergreen.

8. On or about ____ November 1974, the plaintiff, Fleming, and his associates submitted to the Planning Commission for Albemarle County a plan for the development of Evergreen as a planned unit development of six dwellings per acre, with an average price of $35,000 (Evergreen I). The intent of the developers, and particularly of Fleming, to sell homes to persons of either race was prominent.

9. Out of ostensible concern for the proposed influx of 2,400 people viewed by them as an invasion of their peace and harmony on Shack Mountain and, further, out of professed concern for increased pollution of the reservoir as in their perception the Evergreen plan forebode, Professor and Mrs. Moore attended the site plan meeting on the

Evergreen project in November 1974. On that occasion Moore expressed to Fleming an interest in acquiring a fraction of an acre of Fleming's land and was given a copy of the subdivision plat. The two men exchanged promises that Moore and the proponents of Evergreen would meet within ten days to negotiate.

10. Under date of 27 November 1974, Moore informed Fleming of his decision to abandon the proposed negotiations and to oppose the Evergreen project in the public hearings, explaining his decision in these words: "as I feel I must do for the good of my neighbors and the county as a whole." A copy of the letter is herewith filed as Exhibit "A".

11. At two subsequent meetings of the Planning Commission held in or about January of 1975 the defendant, Moore, addressed the Commission in opposition to the proposed plan for Evergreen as did many other persons, several of whom were

professors at or otherwise identified with the University of Virginia. The only black person who spoke in opposition to Evergreen was then the Mayor of the City of Charlottesville who expressed official concern for the reservoir which supplies drinking water for the inhabitants of the City. Among those who spoke in opposition was Professor Frederick Nichols, Chairman of Architectural History at the University, who expressed concern for the historical aspect of Shack Mountain. The defendant's speech at the January 22, 1975 meeting of the Board of Supervisors, in opposition to Evergreen I, is herewith filed as Exhibit "B". At a subsequent meeting of the Board of Supervisors, Evergreen I was defeated.

12. In or about September of 1975 and at the instance of Professor Frederick Nichols, a social and professional colleague of Professor Moore for

about thirty years and a member of the Virginia Historic Landmark's Commission from its beginning, Shack Mountain was designated by that Commission as one of the most important buildings in the cultural history of the state. In support of this proposed designation, the Dean of the School of Architecture of the University of Virginia had explained that the siting of the place on the ridge with the view enhanced by cut out windows in the trees is a part of the architectural conception which makes the building so important. A housing development visible from the back porch of the Shack Mountain dwelling house or from the flower garden would spoil this architectural conception.

13. Sometime before a second plan for the development of Evergreen had been submitted, the defendant, Moore, discussed the historic character of Shack

Mountain with his representative on the Board of Supervisors.

14. In or about November of 1975, the plaintiff, Fleming, and his associates submitted to the Planning Commission a second plan for the development of Evergreen (Evergreen II) which proposed the erection of two and one-half dwelling units per acre rather than the six units proposed in the first plan.

15. The defendant, Moore, continued to oppose the development of Evergreen.

16. The Planning Office provisionally approved this second plan for the developing of Evergreen; one of the conditions for approval being the reservation of an eight acre tree buffer, a strip 100 feet wide along the border with Shack Mountain, to mask the Evergreen development from the view from Shack Mountain.

17. Before these conditions had been communicated to the plaintiff

or his associates, the defendant, Moore, obtained a mimeographed copy of the conditions on the same night they were determined by the Planning Commission.

18. At two public meetings of the Planning Commission and at two public meetings of the Board of Supervisors, the defendant, Moore, was in attendance in opposition to Evergreen II and at one or more of such meetings he was represented by James B. Murray, Jr., Esquire, who, asserting his role as attorney for W. Bedford Moore, III, spoke in opposition to Evergreen II.

19. By letter of 11 December 1975 on behalf of Mr. and Mrs. Bedford Moore, James B. Murray, Esquire, suggested that he meet with Fleming and his associates and his attorney Edgar F. Puryear, Esquire, to whom the letter was addressed, to discuss changes in Evergreen II which the Planning Commission had required; the buffer strip being the

only change specifically mentioned in the letter. A copy of this letter is herewith filed marked Exhibit "C".

20. By this manifestation of Moore's interest in the proposed 100 foot buffer strip on Fleming's property for the entire length of their common boundary, together with the rather obvious fact that Fleming's loss of the use of eight acres of his land would benefit no one but Moore, the plaintiff was led to believe that Moore had instigated the idea of the tree buffer for one or both of two purposes: (1) to further reduce the population density of Evergreen by some twenty dwelling units "for the good of [his] neighbors and the county as a whole"; and (2) to screen the low cost housing development from the view of Shack Mountain, for the good of the owners of Shack Mountain and their successors in title.

21. In each of the plans for the development of Evergreen, the plaintiff and his associates had shown that the several dwelling units would be connected to the municipal water mains and that sewage from the Evergreen development would be pumped into the municipal sewer lines.

22. The plaintiff was aware that lands owned by other persons in the immediate vicinity of the proposed Evergreen development were zoned to permit residential developments of higher density than that proposed for Evergreen and, further, that such development of those lands was not conditioned upon the pumping of sewage into the municipal sewer lines. Immediately across State Highway 743 from Evergreen and between Evergreen and the reservoir were three tracts, aggregating approximately 100 acres, zoned to permit six dwelling units per acre. Adjacent

to and east of Evergreen there were approximately 45 acres zoned to permit twenty dwelling units per acre. Adjacent to and south of Evergreen was a duplex development, with a population density of six units per acre, all of the occupants of which were white. The natural drainage of all of these lands is into the reservoir.

23. Plaintiff, Fleming, caused to be published in the January 16, 1976 edition of the Cavalier Daily (a newspaper published at the University of Virginia) and, also, in the Charlottesville-Albemarle Tribune (a newspaper published in the City of Charlottesville) an article captioned "RACISM" the full text of which is filed as Exhibit "D" hereof. Of and concerning the defendant Moore the article says:

> "There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monti-

> cello upon the hilltop overlooking the developing community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight."

24. On or about May 20, 1976, the defendant, Moore, through his attorney, offered to pay the plaintiff, Fleming, $25,000 for a one hundred feet strip adjoining Shack Mountain. On another occasion, a meeting of the Board of Supervisors, Moore inquired and ascertained from the curator of Monticello that Thomas Jefferson had, indeed, located his slaves' quarters down hill from and in sight of his mansion house.

25. On 3 January 1977 the instant defendant, Moore, filed in the Circuit Court of Albemarle County an action for

damages against the instant plaintiff, Fleming, demanding $500,000 in actual damages and $500,000 in punitive damages, predicated on a charge that the 16 January 1976 publication was a false, scandalous, malicious, insulting and defamatory libel of and concerning him (Moore) and that same had been wrongfully, willfully, maliciously and injuriously published by Fleming. At or about the same time, the instant defendant, Moore, filed a similar action in the Circuit Court of the City of Charlottesville which has not been called for trial.

26. The first trial of the libel action ended on December 6, 1977 with a jury verdict awarding Moore $10,000 in compensatory damages and $100,000 in punitive damages, on which the trial court entered judgment on April 28, 1978. Over the dissent of Justice Harrison who would have reversed and entered final

judgment for the defendant (Fleming), the Supreme Court of Virginia reversed the judgment of the trial court and remanded the case for a new trial. (Fleming v. Moore [March 6, 1981], 221 Va. 884, 275 S.E. 2d 632).

27. The Supreme Court of Virginia read the record as showing that Moore merely resorted to an administrative body in order to protect the value of his own residence and, hence, held that Moore's role in the public hearings concerning "Evergreen" do not merit his classification as a public figure with the burden of showing, as a prerequisite to recovery of compensatory damages, that Fleming acted with malice. However, the record then before the Supreme Court did not contain the text of Moore's 27 November 1974 letter to Fleming (Exhibit "A") wherein Moore classified his intended opposition to Evergreen as "[something] I

feel I must do for the good of my neighbors and the county as a whole."

28. The second trial of the libel action ended on October 22, 1982 with a jury verdict awarding Moore $100,000 in compensatory damages and $250,000 in punitive damages, together with interest on the $250,000 award at a rate of 12% per year from January 16, 1976. Moore's counsel had peremptorily struck every black citizen from the venire and thus caused the jury to be entirely composed of white citizens. Judgment on this verdict was entered on June 3, 1983.

29. The 27 November 1974 letter from Moore to Fleming (Exhibit "A" herein) was received as evidence in the second trial of the libel action. No pecuniary or other loss was shown. Neither was there evidence of actual malice. There was a complete absence of evidence that Fleming had any question, much less serious doubts, as to the

truth of his opinion of Moore's motivations. Nevertheless, on proof limited to Moore's claim that on occasions he was upset and embarrassed, the all white jury levied against Fleming the largest libel verdict ever upheld by a trial court in the Commonwealth.

30. By order entered on 7 June 1984 the Supreme Court of Virginia awarded James N. Fleming an appeal from the judgment of the Circuit Court of Albemarle County, limited to four assignments of error, viz:

D. The jury's award is so excessive that it indicates the jury was influenced by passion, prejudice or corruption, or misconceived or misconstrued the law or facts.

E. The jury's award of prejudgment interest at the rate of 12% per annum is contrary to law because prejudgment interest is

not allowable on punitive damages and, further, because 12% exceeds the maximum allowable rate of prejudgment interest.

G. The trial court erred in refusing to instruct the jury that, in order to find Fleming liable for compensatory damages, it must find that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

H. The trial court erred in refusing to strike plaintiff's evidence on punitive damages because there was insufficient evidence on which the jury could conclude that Fleming knew what he was publishing was false or had reckless

disregard for whether or not it was true.

31. In so doing, the Supreme Court of Virginia rejected other assignments of error, viz.

A. The trial court erred in failing either to grant Fleming's Motion to Dismiss or strike plaintiff's evidence because the alleged libel was an absolutely privileged expression of opinion under the First Amendment.

B. The trial court erred in failing to strike plaintiff's evidence because the alleged libel was not defamatory as a matter of law.

C. The trial court erred in failing either to grant Fleming's Motion for Summary Judgment or his motion to

strike plaintiff's evidence because plaintiff failed to prove special damages, which must include but are not limited to monetary loss.

F. The trial court erred in concluding that Moore was not a public figure.

I. In the specific circumstances and context of this case, the plaintiff's striking every black juror to create a jury without blacks deprived Fleming of his right to due process under the Fifth and Fourteenth Amendments and to a jury trial under the Seventh Amendment.

32. By reason of the two verdicts in the libel action, found by all-white juries, by each of which the instant plaintiff was cast solely because of his race and on each of which the trial court

entered judgment, and by reason of the summary affirmance of the rulings of the trial court to which assignments of error "A", "B", "C", "F", and "I" were asserted in the Supreme Court of Virginia, the plaintiff, Fleming, is persuaded that, unless this court will intervene, the First Amendment does not protect his freedom in or near Albemarle County to speak or to publish his opinions on matters of public concern, particularly on racial issues, if the object of his intended criticism is a white person. The chilling effect of the pending libel actions impels the plaintiff to forego such participation in the public exchange of ideas.

33. The plaintiff is a realtor and a considerable part of his income has come from his buying and selling real estate. On or about 6 June 1983 the defendant, Moore, caused said 3 June 1983 judgment to be docketed in the Clerk's

Office of the Circuit Court of Albemarle, in the Clerk's Office of the Circuit Court of the City of Charlottesville, and in the Clerk's Office of the Circuit Court of the City of Waynesboro, in which political subdivisions the plaintiff, Fleming, owns real properties which constitute the bulk of his estate. The plaintiff's conduct of his business and his earning a livelihood is and will continue to be hampered by the fact that the judgment in the libel action has been docketed in the several Clerk's Offices and appears to be a lien upon the plaintiff's real estate. An irrevocable letter of credit was obtained and accepted by the trial judge in lieu of surety for the initial appeal bond in penalty of $250,000. Subsequently, on motion of Moore's counsel, the Supreme Court of Virginia required additional bond with approved surety in penalty of $480,000. The plaintiff's access to

working capital has been egregiously curtailed as a result of the requirements of appeal bond in penalty of $710,000.

34. Plaintiff, Fleming, has paid or obligated himself to pay enormous sums of money in the defense of the libel action and in prosecuting appeals from judgments therein. Unless relief as herein prayed will be granted, the plaintiff's prospects for relief are and will be limited to the unlikely possibility that the Supreme Court of the United States will grant certiorari to review the 7 June 1984 rejection, by the Supreme Court of Virginia, of his claim of privilege under the First Amendment to the Constitution or the probability that, at best, the Supreme Court of Virginia will again remand the libel action for a third trial. Meanwhile, the plaintiff is and will continue to be deprived of the day to day protection of the First Amendment and, for having

exercised a privilege under that Amendment, will continue to suffer diminution, if not a deprivation, of his ability to carry on his business and to earn a livelihood.

35. Moreover, the continued prosecution of the libel actions and the appearance of liens encumbering plaintiff's properties and the inordinate requirements of bond of such magnitude as to disestablish the plaintiff's credit combine to effect a deprivation of plaintiff's property without due process of law in violation of the Fourteenth Amendment to the Constitution.

WHEREFORE, the plaintiff prays:

a. That the court will set this matter for an early hearing on the merits and thereupon adjudge and decree that the publication, which is the basis for the judgment of the Circuit Court of the County of Albemarle entered on June 3, 1983 in favor of W. Bedford Moore,

III and against James N. Fleming, is indeed within the protection of the First Amendment and that the said judgment is null and void and of no effect in law.

b. That the defendant, W. Bedford Moore, III will be permanently enjoined and restrained from causing execution to be issued upon, or otherwise taking any steps to enforce payment of, the judgment of the Circuit Court of the County of Albemarle entered on June 3, 1983 in favor of W. Bedford Moore, III and against James N. Fleming.

c. That the defendant, W. Bedford Moore, III, will be permanently enjoined and restrained from further prosecuting any action for libel against the plaintiff, James N. Fleming, which may be predicated upon the enouncement the full text of which is reproduced as Exhibit "D" hereof.

d. That the plaintiff will recover of the defendant damages in compensation for his costs, expenses, counsel fees, harassment, and loss of time in defending the action for libel, and his costs and reasonable counsel fees incident to this action, and such other and further relief as is just.

/s/ James N. Fleming
James N. Fleming

GERALD G. POINDEXTER
P. O. Box 766
Surry, VA 23883

/s/ S. W. Tucker
S. W. TUCKER
HILL, TUCKER & MARSH
509 North Third Street
P. O. Box 27363
Richmond, VA 23261-7363

Counsel for Plaintiff

VERIFICATION

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE, to-wit:

Before me, the undersigned Notary Public for the State of Virginia at

Large, personally appeared JAMES N. FLEMING in the City aforesaid and made oath that the matters and things stated in the foregoing complaint by him subscribed are true to the best of his knowledge, information, and belief.

Given under my hand and Notarial seal this 2nd day of August, 1984.

My commission expires: May 24, 1986.

/s/ Nathaniel D. Smith
Notary Public

SHACK MOUNTAIN
ROUTE FIVE
CHARLOTTESVILLE
VIRGINIA 22901

27 November 1974

Mr. James N. Fleming
Ideal Realty Company
304-A Ridge Street
Charlottesville, VA 22901

Dear Mr. Fleming:

I write you as a courtesy to say that I have not followed up that proposed meeting with you and your partners because I have realized, upon looking further into the matter, that I could not negotiate with you gentlemen in good faith and then turn around and oppose your project in the public hearings--as feel I must do for the good of my neighbors and the county as a whole.

Let me assure you that there is absolutely nothing personal in my opposing you on this matter.

Sincerely yours,

Bedford Moore

BM:pa

EXHIBIT "A"

Mr. Bedford Moore: Mr. Chairman and members of the Board. I did not realize I lived in a castle, I hope my wife will not take that remark any more seriously than I do. However, perhaps I should read into the record a letter of November 27, 1974 addressed to Mr. James N. Fleming.

> "I write you as a courtesy to say that I have not followed up that proposed meeting with you and your partners because I have realized upon looking further into the matter, that I could not negotiate with you gentlemen in good faith and then turn around and oppose your project in the public hearings--as I feel I must do for the good of my neighbors and the county as a whole.
>
> Let me assure you that there is absolutely nothing personal in my opposing you on this matter.
>
> Sincerely yours,
>
> (signed) Bedford Moore"

If I may Sir, enter this in the record. To be more serious, my opposition is really, I do have -- and I must

speak I suppose for this reason -- I have about a half mile of frontage all the way along the proposed project. Mr. Carter has indicated that "Evergreen" is practically surrounded with high density. That is not my impression. I think that if you simply look at the map, Mr. Roudabush's contradicts him. The white, it goes almost the whole way around, you add up your boundaries, and it is all A-1. So there is simply a little confusion in Mr. Carter's (shall we way) enthusiasm in his remarks. My opposition, I would like to say simply and briefly, Mr. Chairman and gentlemen, is really on grounds of incompatibility of land use. Not perhaps in the sense that some might take it, it is incompatible I feel, as one of the landowners on the Reservoir (Ivy Creek comes aroung me, across the end, and up the side as you can see, but I shant take time to point that out). Many landowners on the

Reservoir, many of whom are here, I can count several, are opposing this, accepting conservation as a concept perhaps to some disadvantage if you will, but none the less, it is desirable we feel to think of the community as a whole. We must be supported by you gentlemen. We can't hold out alone on this, it is going to be a domino the whole way around the Reservoir and this is the crutial case. I grant you you have a problem historically, up along the bluff, which has been for a long time zoned otherwise. If you start going with A-1, which is what Mr. Fleming, with all due respect to you personally, with Mr. Fleming, Mr. Creg, and his other partners, they are all A-1 just as I am, just as the Greer Estate from whom you have heard tonight read into the record. If you start doing that, I feel for the Reservoir generally. Therefore, I beseach you gentlemen,

protect the Reservoir, support us, we want to support you and we invite you to support us. We landowners all around the Reservoir are ready to hold out to accept conservation. But, I appeal to you, support us by your action tonight.

EXHIBIT "B"

RICHMOND AND FISHBURNE
ATTORNEYS AT LAW
240 COURT SQUARE
CHARLOTTESVILLE, VIRGINIA 22901

December 11, 1975

JOSEPH W. RICHMOND
JUNIUS R. FISHBURN
JOSEPH W. RICHMOND, JR.

TELEPHONE
296-7159
AREA CODE 804

JAMES B. MURRAY, JR.

Edgar F. Puryear, Jr., Esquire
Higginbotham and Puryear
Orange, Virginia 22960

Re: Evergreen development

Dear Mr. Puryear:

It was a pleasure seeing you again at the Albemarle County Planning Commission meeting on December 2.

In your public statement at that meeting, you suggested that your clients would be willing to discuss a potential buffer strip with Mr. and Mrs. Bedford Moore, our clients. We surmise from the numerous matters discussed at the December 2nd meeting that your client is probably going to redraw the plans for his proposed development. If this is in fact the case, we would like to hereby offer, on behalf of Mr. and Mrs. Moore, to meet with you and your clients and discuss the proposed changes in the plan.

We look forward to hearing from you.

Sincerely,

James B. Murray, Jr.

M,jr/n
cc: Mr. and Mrs. W. Bedford Moore, III

EXHIBIT "C"

The Cavalier Daily, University of Virginia, Charlottesville, Friday, January 16, 1976

RACISM

I have endeavored to realize the opportunity to provide housing and pleasant surroundings for working people - the sort of people who made this the great country that it is.

I do not expect any Farmington members to buy my houses. The tenured position-holders who live off the public dole at the expense of the working people are already well-housed, and could not be expected to live in a racially-integrated neighborhood, anyhow.

There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hilltop overlooking the developing community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight.

There is a great conflict waging between the haves and the have-nots. Obviously we have created too much financial security for the tenured segment of the economic community whose greed is repeatedly shown by their expression of "I've got mine -- too bad about you".

I am a lover of liberty and freedom of opportunity. I cannot stand by and see the have-nots oppressed by the no-growth people who are living off of our work. I know that this Country did not achieve the highest living standard in the world by no-growth or by oppression of the working man, and yet today the opportunity to improve one's living standard is being violently opposed by the same people who oppose my proposed neighborhood.

Pollution of the reservoir is being used as the current excuse to foster no-growth. The solution, of course, is to remove the guaranteed incomes of these greedy people and put them in the position of seeing the world through the eyes of one seeking the opportunity to improve his or her living standard. Only then would they admit that the pollution excuse is a sham.

I will develop Evergreen, and a lot of people will benefit from it.

Signed: James N. Fleming

ADVERTISEMENT

EXHIBIT "D"